BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

KENNETH A. CORBETT	)	
Claimant	)	
VS.	)	
	)	Docket No. 216,787
SCHWAN'S SALES ENTERPRISES	)	
Respondent	)	
AND	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

On December 3, 1997, the application of claimant for review by the Workers Compensation Appeals Board of the Award of Administrative Law Judge Bruce E. Moore dated June 11, 1997, came on for oral argument.

APPEARANCES

Claimant appeared by and through his attorney, Scott M. Price of Salina, Kansas. Respondent and its insurance carrier appeared by and through their attorney, John W. Mize of Salina, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record and stipulations as specifically set forth in the Award of the Administrative Law Judge are herein adopted by the Appeals Board.

ISSUES

(1) Whether K.S.A. 44-508(e), which precludes claimants from receiving workers compensation benefits if the employee suffers disability as the result of the normal activities of day-to-day living, applies.

(2) Did claimant's accidental injury arise out of and in the course of his employment with respondent?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Appeals Board makes the following findings of fact and conclusions of law:

Claimant, a truck driver for respondent, alleges personal injury by accident on February 23, 1995. Claimant was involved in team driving for respondent which meant claimant and another driver took turns. During the time the other driver was driving, claimant would climb into the sleeper unit of the truck, a 3½- by 7-foot unit, and sleep. On the date of accident, claimant awoke from his sleep and began to get dressed in preparation for his next turn at driving. Claimant regularly wore cowboy boots when he drove. The boots were neither required nor provided by respondent but were the personal preference of the claimant. While sitting on the edge of the sleeper unit bed and pulling on his boots, claimant felt pain in his back with radiculopathy into his right leg and calf. Claimant contacted his supervisor on that date and advised of the problem. Claimant underwent medical treatment with several doctors and was ultimately diagnosed with a herniation at L5-S1.

K.S.A. 44-501 requires that an employee prove personal injury by accident arising "out of" and "in the course of" employment in order to collect benefits. The Administrative Law Judge found that claimant suffered accidental injury "in the course of" his employment and that issue is not contested. The dispute regards whether claimant suffered accident "out of" his employment. The phrase "out of" employment points to the cause or the origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. An injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. Newman v. Bennett, 212 Kan. 562, 512 P.2d 497 (1973).

In this case, the determination of whether claimant's accident and injury arose "out of" his employment leads to a consideration of the language in K.S.A. 44-508(e). That statute defines "personal injury" and "injury" to exclude a "disability" resulting from the "normal activities of day-to-day living."

K.S.A. 44-508(d) defines "accident" and goes on to provide that "[t]he elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment." However, K.S.A. 44-508(e), which defines "personal injury" and "injury", also contains the following prohibition:

> "An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers **disability** as a result of the natural aging process or by the normal activities of day-to-day living." (Emphasis added.)

The term "accident" and "injury" are not synonymous and neither are the terms "injury" and "disability." *See, e.g.,* Barke v. Archer Daniels Midland Co., 223 Kan. 313, 573 P.2d 1025 (1978).

As are many of the activities performed in the workplace, the act of pulling on one's boot would appear to be a normal activity of day-to-day living. However, K.S.A. 44-508(e) does not exclude "accidents" that are the result of normal activities of day-to-day living, but instead it excludes disabilities. In this case, claimant's disability was caused by the work-related accident that occurred during the act of pulling on his boots. However, claimant's disability was not caused or contributed to by his activities of day-to-day living. This distinction is made in Boeckmann v. Goodyear Tire & Rubber Co., 210 Kan. 733, 504 P.2d 625 (1972). The Supreme Court held in Boeckmann that a physical disability resulting from a degenerative arthritic condition of the claimant's hips, which had progressed over a period of years while the worker was employed, is not compensable as an accident arising out of and in the course of his employment under the circumstances the Court found existed in that case. The medical evidence in Boeckmann attributed claimant's disability to the arthritic changes in claimant's hips and not to the accident or traumatic event that was the basis for the claim. The Court found that the accident or trauma which occurred on the job was not the cause of Mr. Boeckmann's disability. Mr. Boeckmann's disability was found not to be compensable because it could not be related to the accident alleged and the degenerative condition could not be related to the work any more than to any of claimant's activities on or off the workplace. Thus, causation was not established between the disability and the work. The Court found that any movement would aggravate Mr. Boeckmann's condition and there was no difference between activities on the job and activities off the job.

Respondent also cites as support for its position Martin v. U.S.D. No. 233, 5 Kan. App. 2d 298, 615 P.2d 168 (1980). In Martin, claimant had a preexisting back condition which had troubled him for ten years. His injury occurred while he was exiting his truck in respondent's parking lot. The Court of Appeals citing Hensley v. Carl Graham Glass, 226 Kan. 256, 597 P.2d 641 (1979), discussed and analyzed three general categories of risks: (1) those distinctly associated with the job; (2) risks which are personal to the worker; and (3) the so-called neutral risks which have no particular employment or personal character. Only the risks falling in the first category are universally compensable. Personal risks do not arise out of the employment and are not compensable. Before an injury can be said to arise out of the employment, the risk must be incidental to work. The risk in Martin was found not to be associated with his employment and benefits were denied.

When defining the word "injury", Larson in 3 Larson's Workers Compensation Law, § 42.11, 7-804 (1997), found the best definition to be that provided in the Massachusetts opinion of Burn's Case, 218 Mass. 8, 105 N.E. 601, 603 (1914). Larson's noted that the Massachusetts opinion defined injury very broadly. However, even that broad definition did not encompass normal wear and tear injuries. In defining the word "injury", the Massachusetts court stated:

> To be compensable the harm must arise either from a specific incident or series of incidents at work, or from an identifiable condition that is not common and necessary to all or a great many occupations. The injury need not be unique to the trade, and need not, of course, result from the fault of the employer. But it must, in some sense we have described, be identified with the employment.

In the case at hand, claimant was injured as he was pulling on his boot. That act of pulling on his boot constituted an accident. Furthermore, the accident arose "out of" his employment because of the nature, conditions, obligations, and incidents of the employment. His job as a truck driver involved team driving which meant that he was to sleep while his co-driver operated the truck. In this way, the act of removing his boots to sleep and putting his boots on to drive were work-related activities. In addition, claimant's injury did not result from any preexisting degenerative condition such as in Boeckmann. The injury resulted from the single traumatic event associated with pulling on his boot. For these reasons, claimant's disability was not caused by activities of day-to-day living as that term is defined by K.S.A. 44-508(e).

Therefore, the Appeals Board finds that the act of putting on his boots in a sleeper cab did constitute an injury arising "out of" his employment and is not an activity of day-to-day living as contemplated by K.S.A. 44-508(e). Therefore, the Appeals Board finds that the Award of Administrative Law Judge Bruce E. Moore dated June 11, 1997, denying claimant benefits should be reversed.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Bruce E. Moore dated June 11, 1997, should be, and is hereby, reversed and claimant is granted benefits for an accidental injury occurring on February 23, 1995, arising out of and in the course of his employment with respondent. This matter is remanded to the Administrative Law Judge for consideration of the additional issues regarding the nature and extent of claimant's injury and/or disability, claimant's entitlement to additional temporary total disability compensation, and claimant's entitlement to outstanding medical expenses. The Appeals Board does not retain jurisdiction over this matter and the appropriate statutory guidelines must be followed if the parties wish a review of any future decisions by the Administrative Law Judge.

IT IS SO ORDERED.

Dated this ____ day of May 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

This Appeals Board member dissents from the opinion of the majority in the above matter. K.S.A. 44-508(e) precludes benefits when an injury occurs as a result of the "normal activities of day-to-day living." This phraseology has not been specifically addressed by the Kansas Appellate Courts. The majority discussed both Boeckmann, supra, and Martin, supra, in deciding that this claimant suffered a compensable accidental injury. It is significant that both the Supreme Court and the Court of Appeals in the above cases denied benefits to the claimant. In Boeckmann the claimant was a 54-year-old employee with a history of degenerative arthritis dating back over ten years. On the date of accident claimant pulled a tire off of the conveyor belt and had stooped to pick up the tire when he felt a pain hit him in the back. The Supreme Court held that claimant's underlying degenerative problem, which would be aggravated by almost any everyday activity, did not constitute an accident or injury as contemplated by the Workers Compensation Act.

Similarly, in Martin the claimant had a preexisting condition which had been present for ten years. The court held the simple act of an employee exiting his own truck did not constitute an accidental injury arising out of and in the course of employment but was instead a risk personal to the worker and, thus, not compensable.

In this instance, the claimant's activities encompassed the mere act of pulling on his boots. This is not a significant physical activity unless it is coupled with a previously injured back. When dealing with the definition of the normal activities of day-to-day living, the Appeals Board must look outside Kansas in order to seek guidance. In Cabral v. Caspir Building Systems, Inc., 920 P.2d 268 (Wyo. 1996), the court was asked to determine whether the act of picking up a pack of cigarettes constituted a compensable injury. Wyoming Statute 27-14-102(a), in effect at the time, held that a compensable injury does

not include "any injury resulting primarily from a natural aging process or from the normal activities of day-to-day living, as established by medical evidence supported by objective findings." *Id*. at 269.

The Wyoming court found that claimant's action of bending down to pick up a pack of cigarettes did not constitute an accident "in the course of" his employment and benefits were denied. Similarly, the mere act of pulling on one's boots would not constitute an accident arising "out of" one's employment.

In addition, when considering Martin's three categories of risks, this Board member would find that the risk associated with pulling on one's cowboy boots is a personal risk to the worker, would not arise "out of" the employment and would not be compensable. This Board member would affirm the Award of the Administrative Law Judge and deny benefits to claimant for the incident on February 23, 1995.

BOARD MEMBER

c: Scott M. Price, Salina, KS
John W. Mize, Salina, KS
Bruce E. Moore, Administrative Law Judge
Philip S. Harness, Director